In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-278

UNITED STATES OF AMERICA,

Respondent,

v.

CHAMPION INTERNATIONAL CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MANLEY B. STRAYER
BARNES H. ELLIS
900 S. W. Fifth Avenue
Portland, Oregon 97204
Counsel for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 8-77

INDEX

CITATIONS

CITATIONS (Cont.)

Statutes

In the Supreme Court
of the United States

OCTOBER TERM, 1977

No._____

UNITED STATES OF AMERICA,

Respondent,

v.

CHAMPION INTERNATIONAL CORPORATION,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, initially filed May 3, 1977, as amended July 20, 1977.

OPINIONS BELOW

A copy of the unreported opinion of the United States District Court for the District of Oregon entered July 16, 1975 is attached as Appendix A. infra, A1.

The amended opinion of the United States Court

of Appeals for the Ninth Circuit dated July 20, 1977 is not yet reported. A copy is attached as Appendix B, infra, A9.

JURISDICTION

The judgment of the court of appeals was entered May 3, 1977. Petitioner filed a timely petition for rehearing and a suggestion for rehearing in banc, which was denied on July 20, 1977. A copy of the order denying the petition is attached as Appendix C, infra, A17. An order staying issuance of mandate pending disposition of this petition for writ of certiorari was filed on August 2, 1977, a copy of which is attached as Appendix D, infra, A19. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

The Sherman Act, 15 U.S.C. § 1, declares illegal every "contract, combination . . . or conspiracy, in restraint of trade or commerce . . ." In this criminal case the trial court specifically found the defendants, timber operators with processing plants located adjacent to timber offered for sale by the United States Forest Service, properly discussed with one another each other's interest in upcoming sales without actually committing themselves with respect to any such sales. The trial court further found that a pattern of noncompetitive bidding among the defendant mills was lawfully established and explicable by rational economic behavior. But solely by reason of the continuation of similar bidding concurrent with such discussions the trial court convicted the defendants of an "implied agreement" of uncertain terms, scope and duration relating to the timber sales. The court of appeals, ignoring the trial court's specific findings and treating the case as though it were an appeal from a general jury verdict, affirmed.

The questions presented by this petition are:

1. Can the express provisions of the Sherman Act requiring a "contract, combination . . . or conspiracy" be judicially restated so as to make the mere continuation of lawful parallel conduct a criminal offense as an "implied" or "tacit" "understanding"?

2. Can such an "implied" or "tacit" understanding" be the basis of a criminal conviction absent any evidence or finding of intent by the participants to act in concert?

3. Absent any allegation or finding of substantial effect on interstate commerce, can the jurisdictional reach of the Sherman Act be construed to embrace transactions involving standing timber, which necessarily must be cut and processed within the state, on a theory of "constructive flow" of commerce based upon the buyer's intent eventually to resell the finished products in interstate commerce?

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1 [1973], 26 Stat. 209 (prior to its amendment by 88 Stat. 1708 and 89 Stat. 801) stated:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or

with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

STATEMENT OF THE CASE

1. Proceedings in the District Court

Petitioner is the owner and operator of a large number of forest products manufacturing facilities throughout the United States, including a small veneer mill located at Idanha, Oregon, within the Detroit Ranger District of the Willamette National Forest. The Detroit Ranger District is situated in a steep, narrow canyon through which cuts the North Santiam River. Except for respondent's mill and two mills operated by co-defendants, the timber in the canyon is remote from major processing facilities. Accordingly, the three resident mills in the canyon historically have purchased in excess of 95% of the annual volume of timber put up for bid there by the United States Forest Service. During the period preceding mid-1967 one of the mills, Young & Morgan, Inc., significantly expanded its operations and raw material requirements. During this period of Young & Morgan's expansion, the mills experienced a bidding war in which prices for timber sales frequently exceeded three times the Forest Service's appraised value. In mid-1967 this bidding war ended, and between that date and late 1972 relatively few sales on which only the resident mills bid sold for amounts significantly in excess of the appraised value.

On September 9, 1974 the resident mills, together with a number of individual officers and employees, were indicted under Section 1 of the Sherman Act. (A fourth mill operated by Frank Lumber Company utilized primarily hemlock and not the dominant spe-

cie, Douglas fir. Frank Lumber Company also was indicted, but was dismissed on motion at the conclusion of the government's case.) The charging allegations of the indictment, as clarified by the government's bill of particulars, were that commencing with the change in bidding pattern in mid-June 1967, and continuing to the date of the indictment, the defendants entered into a continuing conspiracy (1) to eliminate competitive bidding for United States Forest Service timber, (2) to allocate the timber among themselves, (3) to fix, reduce, and stabilize the price paid for the timber, and (4) to bid up any nonconspirator who attempted to bid on the timber.

The case was tried to the court without a jury. On July 16, 1975, the trial court issued its written opinion, including findings of fact and conclusions of law. The trial judge expressly rejected the Government's principal contention made throughout the trial that the mid-June 1967 shift from a period of intensive bidding to a period of relative peace was the result of collusion. The court expressly found that there was no evidence of any such agreement, and based on the evidence presented, the court concluded that no such agreement had occurred. The trial court further explained that the initial period of noncompetitive bidding "was caused by normal economic forces and was not the result of any conspiracy." Each of the operators knew the timber sales on which one or another neighboring mill would have a competitive advantage by reason of the sale's location, specie mix, logging requirements, and other operating factors. Each of the mills knew that a mill which had a competitive advantage on a sale, or a greater need for a particular sale, could and would bid a higher price for the timber at the time of the oral auction. Each also knew that if it ran up the price on a sale in which another mill had such a competitive advantage, that mill logically would likewise run up the price on sales on which it had the advantage. For these reasons the trial court concluded that the noncompetitive bidding pattern established in mid-June 1967 was natural and explicable by normal economic forces. Although the trial court made no finding one way or the other, the defendants introduced substantial evidence that for the duration of the post-mid-1967 low bidding period, the mills in the canyon experienced an equilibrium in timber supply relative to their mill capacities, as well as an economic depression in the forest products industry end-product price, each of which also tended to contribute to a lack of intensive bidding.

The trial court also made findings of fact with respect to four instances during the period March 1968 through the fall of 1971 in which representatives of the three mills discussed a variety of industry concerns, including their respective probable interests in certain of the upcoming timber sales. With respect to these discussions, the trial court specifically found that no participant committed himself not to bid on any sales, and that the meetings, including discussions about each participant's interest in upcoming sales, were not of themselves illegal. The trial court then held, however, that the combination of these discus-

tern it had previously held was lawfully established in mid-1967, permitted it to reach the legal conclusion that the defendants were guilty, beyond a reasonable doubt, of an "implied agreement."

The trial court further found interstate commerce jurisdiction, despite the fact that the transactions involved standing timber all of which necessarily required cutting and processing within the state, on the theory that the defendants' purchases were made "with the express intent that the end-products they manufactured would continue in the stream of interstate commerce," citing *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1329 (1948).

2. Proceedings in the Court of Appeals

Following imposition of sentences involving substantial fines and incarceration for the individual convicted defendants, respondent and its co-defendants appealed to the Ninth Circuit Court of Appeals. In an opinion issued on May 3, 1977, amended July 20, 1977, that court affirmed the convictions. Acknowledging that the government was unable to introduce direct evidence of any express agreement, and ignoring the illogic of the trial court's conclusion of illegality based on discussions and bidding behavior each of which standing alone it had expressly found lawful, the court of appeals conclusorily stated: "Whether or not anyone ever agreed at those meetings to bid or to refrain from bidding in any way, there was no doubt that the defendants 'had an understanding' about bidding."

With respect to interstate commerce jurisdiction, the court of appeals did not comment upon the trial court's theory of "constructive flow" based upon the intent of the purchaser of unsevered raw materials, but assumed a finding of substantial effect on commerce which the trial court had never made, and the indictment had never charged.

Finally, the court of appeals brushed aside the question whether such an "implied" or "tacit" "understanding," if it is to be the basis of a conviction for criminal misconduct, must be shown to have been intentionally and consciously entered into by the participants.

REASONS FOR ALLOWING THE WRIT

This petition should be granted because it raises important questions of federal law concerning the substantive scope and jurisdictional reach of Section 1 of the Sherman Act which have not been, but should be, settled by this Court.

Although Congress has on several occasions subsequent to the initial enactment of the Sherman Act in 1890 specified particular forms of conduct sought to be proscribed,[1] it has left unchanged the basic language of Section 1 requiring a "contract," "combination," or "conspiracy," all terms requiring conscious and intentional assent to joint action. Both the trial

[1] See, *e.g.*, Clayton Anti-Trust Act, 38 Stat. 730; Miller-Tydings Fair Trade Act, 50 Stat. 693; McGuire Act, 69 Stat. 282; Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1383.

court and the court of appeals acknowledged that there was insufficient evidence, either direct or circumstantial, upon which to base any finding of actual or express agreement among the defendants. Both courts, then, substituted for the specific language of the statute their own subjective and elastic terms of "tacit" or "implied" "understanding." Having thus redefined the offense in amorphous terms, both courts then relied on a strained interpretation of circumstantial evidence upon which to infer the liability. By so doing, the lower courts have impermissibly expanded by judicial construction the clear scope and intent of the statute, and have left businessmen in general, and the forest products industry in particular, exposed to the peril of criminal conviction under a standard unfairly vague and subjective. Not since the sharply divided decision in *United States* v. *Container Corp. of America*, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969), has this Court construed the essential concepts of "contract, combination . . . or conspiracy" as used in the Act; and neither that nor any other opinion of the Court has sanctioned criminal liability for a "tacit" or "implied" "understanding" of the kind involved here.[2]

A dangerous consequence of permitting criminal conviction for an "implied" or "tacit" "understanding"

[2] Prior opinions of this Court have referred to the concept of a tacit agreement, but in the sense of sufficient evidence from which to infer an express agreement consummated without specific verbal or written communication, yet clearly involving consensual joint action. See, *e.g.*, *Theatre Enterprises* v. *Paramount Film D. Corp.*, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954). In the present case the trial court specifically found no such implied-in-fact express agreement.

based upon an inference drawn from discussions and bidding behavior each in itself lawful, but construed as collusive in combination, is the absence of any finding by the trial court of any knowing or conscious consent to concerted activity by the participants. The opinion of the court of appeals blandly states that the Sherman Act does not require a showing of "specific intent" to restrain trade. But, contrary to the court of appeals' statement of the issue, the Sherman Act, if it is to be the basis of a criminal conviction, must require proof beyond a reasonable doubt that each defendant consciously and intentionally committed to joint action—and not merely engaged in consciously parallel business conduct from which, in retrospect, a trier of fact infers an "implied" or "tacit" understanding." The Sherman Act does not prohibit all noncompetitive business behavior; it only prohibits such behavior when it is the subject of agreement. Whatever may be the evolving common law with respect to "constructive," "implied in law," or "quasi" contracts, imposing civil liability regardless of intent, such doctrines have no place in a criminal prosecution for antitrust conspiracy. This portion of the opinion of the court of appeals is in direct conflict with decisions of other circuits on this issue. See *United States* v. *U. S. Gypsum Co., et al.*, 550 F.2d 115 (3rd Cir. 1977), *petition for writ of certiorari pending* (3rd Cir. 1977); *United States* v. *Purin*, 486 F.2d 1363, 1369 (2d Cir. 1973), *cert. denied sub nom. Da Silva* v. *United States*, 416 U.S. 987, 94 S. Ct. 2392, 40 L. Ed. 2d 764 (1974) (separate appeal), *cert. denied sub nom. Purin* v. *United States*, 417 U.S. 930, 94 S. Ct. 2640, 41 L. Ed. 2d 233 (1974) (separate appeal).

Finally, the trial court's "constructive flow" concept of interstate commerce jurisdiction is without any support in decided opinions of this court, and would virtually eliminate any jurisdictional limit to the Sherman Act. *Mandeville Farms*, supra, the sole case relied upon by the district court, although factually parallel, was decided on a wholly unrelated ground. In that case, the court held that the complaint stated a jurisdictional basis because the alleged conspiracy by sugar beet processors to fix prices paid to in-state growers would have a substantial *effect* on subsequent interstate sales of refined sugar. Misapprehending *Mandeville*, the trial court adopted a novel theory that a producer (or buyer) of raw materials which necessarily will require substantial processing within the state can be deemed to have initiated the "flow" of commerce when he acquires the raw materials with a general intent to resell the finished product in interstate commerce. This concept ignores the substantial body of law evolved by this Court with respect to the converse situation—when does the "flow" of interstate commerce end? In *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 63 S. Ct. 332, 87 L. Ed. 460 (1943), the court held that interstate commerce ends when goods come to rest with a wholesaler, unless they were purchased with an intent to resell to a specific in-state customer. *And see, Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 39 S. Ct. 237, 63 L. Ed. 517 (1919). The opinion of the court of appeals salvaged jurisdiction by ignoring the trial court's theory of "constructive flow," and assuming a finding of "effect" on

commerce that the trial court never made, for which no competent evidence was offered, and which the indictment never charged. Only this Court can definitely resolve the jurisdictional scope of the Sherman Act with respect to transactions involving raw materials to be severed and processed within the state, previously thought to be beyond the scope of the Act absent proof of a substantial effect on interstate commerce.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
MANLEY B. STRAYER
BARNES H. ELLIS
Counsel for Petitioner

August 17, 1977

Nos. 77-278, 77-281, and 77-282

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHAMPION INTERNATIONAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

YOUNG AND MORGAN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

FRERES LUMBER COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN H. SHENEFIELD,
Assistant Attorney General,

BARRY GROSSMAN,
PETER L. DE LA CRUZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-278

CHAMPION INTERNATIONAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-281

YOUNG AND MORGAN, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 77-282

FRERES LUMBER COMPANY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A9-A16)[1] is reported at 557 F. 2d 1270. The opinion of the district court (Pet. App. A1-A8) is unreported.

---

[1]"Pet. App." refers to the appendix to the petition in No. 77-278, unless otherwise indicated.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 1977. The opinion of the court of appeals was modified and a petition for rehearing with suggestion for rehearing *en banc* was denied on July 20, 1977 (Pet. App. A17-A18). The petitions for a writ of certiorari were filed on August 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the findings of the district court, which the court of appeals affirmed, that petitioners had conspired to eliminate competitive bidding on, allocate bids for, and stabilize the price of timber-cutting rights sold at auction by the United States.

2. Whether the evidence establishes that petitioners' violation substantially affected interstate commerce.

STATUTE INVOLVED

Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1, provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. * * *

STATEMENT

The United States Forest Service, an agency of the United States Department of Agriculture, sells the right to harvest timber from tracts of land in the national forests. It sets a minimum appraised value and awards the right to the highest bidder that meets or exceeds that value (Pet. App. A2, A4). For many years, petitioners have purchased such rights from the Detroit Ranger District of the Willamette National Forest in Oregon.

Petitioners purchased approximately 90 percent of Detroit District timber offered at auctions between 1968 and 1972 (Pet. App. A10-A11).

In September, 1974, petitioners were indicted on a single count charging that beginning on or about June, 1967, they combined and conspired in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. The conspiracy consisted of a continuing agreement (1) to eliminate competitive bidding for United States Forest Service timber; (2) to allocate such timber among themselves; and (3) to fix, reduce, and stablize the price paid for such timber at or near the minimum acceptable bid the Forest Service set (Pet. App. A11).

In a non-jury trial, the district court found petitioners guilty of conspiring to eliminate competition and stabilize prices by allocating timber bids amongst themselves[2] (Pet. App. A7). It noted that a period of highly competitive bidding that began in 1964 ended abruptly on June 2, 1967, but it concluded that this change did not result from an agreement among the bidders (Pet. App. A3-A4). The court found, however, that thereafter petitioners participated in a series of meetings at which each discussed its interest in specific timber areas to be offered for sale by the Forest Service (Pet. App. A5-A7).

The court further found that under the bidding pattern evolving from these meetings, only one party bid on a particular area even, when at a prior meeting, more than one firm had expressed interest in that area; that all of the bids were made, without competition, at or near the mini-

---

[2]The Frank Lumber Co. was also named as a defendant. At the close of the government's case, the district court acquitted that company and two individual defendants (Pet. App. A1-A2).

mum appraised value; and that since a timber mill's survival depended on obtaining a supply of raw material, such a consistent pattern of mutual forbearance was unlikely unless the mill operator knew that it would obtain timber at a subsequent sale (Pet. App. A5-A7). The court held that while meetings among competitors are not themselves illegal, even when coupled with an exchange of business information, the petitioners had implicitly agreed to act upon the exchanged information (Pet. App. A6). The court concluded that the series of meetings and corresponding bidding patterns shown by the evidence established beyond a reasonable doubt that "the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves" (Pet. App. A7).[3]

Petitioners stipulated (R. 691) that most of the end products produced from the timber moved in interstate commerce. The district court found that "[t]he requisite element of interstate commerce exists" because the petitioners purchased and processed the timber "with the express intent that the end-products they manufactured would continue in the stream of interstate commerce" (Pet. App. A8).

The court of appeals affirmed (Pet. App. B, C). It held that the evidence was sufficient to support the convictions (Pet. App. A12—A14). It observed that while in a general way an individual mill's potential interest in a specific timber sale could be predicted by anyone familiar with that

[3]The district court found, however, that the government failed to prove that the bidding up of non-conspirators was a part of the conspiracy, but held this allegation not to be an essential element of the crime charged (Pet. App. A7) The court of appeals agreed (Pet. App. A14).

mill's operation, petitioners had been unwilling to leave matters to chance. Rather, at the series of meetings, they advised each other of the future sales in which they were most interested. As a result, the court of appeals concluded, "there was no doubt that the defendants 'had an understanding' about bidding" (Pet. App. A13). The court of appeals also agreed with the district court that the necessary effect upon interstate commerce had been proved (Pet. App. A14).

ARGUMENT

The court of appeals correctly held that the evidence is sufficient to support petitioners' convictions. There is no reason for this Court to consider further the two essentially factual issues the courts below resolved against petitioners.

1. Petitioners contend that the district court improperly based its finding of an implied agreement on circumstantial evidence (Champion Pet. 10-11; Freres Pet. 19-20). It is well established, however, that any implicit or explicit agreement among competitors, whether sellers or buyers, to depress or stablize prices is a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. 1. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 396-397, 400; *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 212-213; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219.[4] A specific intent to violate the law is not required. *United States* v. *Patten*, 226 U.S. 525, 543; *United States* v. *Masonite*

[1]An agreement among competitors to fix or stabilize prices by indirect means, such as an allocation of territories or contracts amongst competitors, also constitutes a *per se* violation. *United States* v. *General Motors Corp.*, 384 U.S. 127, 147; *United States* v. *Topco Associates, Inc.*, 405 U.S. 596; *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 240-241; *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593.

Corp., 316 U.S. 265, 275. Nor need the proof show an express agreement. *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 142. Indeed, precisely because of its secret or camouflaged nature, a price-fixing agreement such as that proved here often may be established only by circumstantial evidence. Cf. *Iannelli* v. *United States*, 420 U.S. 770, 777 n. 10; *Glasser* v. *United States*, 315 U.S. 60, 80. As this Court held in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-810, "[n]o formal agreement is necessary to constitute an unlawful conspiracy. * * * [t]he essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."

Contrary to petitioners' assertions (Freres Pet. 23-26; Young Pet. 12), the district court's finding that the defendants agreed to eliminate competitive bidding did not rest solely on inferences from statistical evidence of their bidding patterns, or from evidence of independent consciously parallel activities. Instead the trial court relied on petitioners' discussions of upcoming sales at a series of meetings—conduct which showed a conspiratorial pattern (Pet. App. A7):

> This pattern shows that when only one party expressed interest in a particular sale, the others refrained from bidding against him when that sale occurred. In several instances, more than one party expressed interest in a sale but, when that sale occurred, all but one of the participants, although qualified to bid, did not do so. All of the sales listed above were sold at or near the appraised price without opposition. I find that the defendants entered into an implied agreement: to eliminate competition for these timber sales; to reduce the price paid for these timber sales; and, to allocate these timber sales among themselves. At the conclusion of each of the meetings described above, for example, it was understood that the most interested buyer would purchase the sale. No one really committed himself not to bid but in sale after sale over a four year period, the one who had expressed the highest interest in a sale was the one who took the sale without opposition. Where, as here, an operator's existence depends upon his raw material supply, one would not likely pass up a sale unless he knew that a subsequent sale would go to him.[5]

Viewing the evidence of the meetings and their consequences in the light most favorable to the government (*Glasser* v. *United States, supra; Hamling* v. *United States*, 418 U.S. 87, 124), the court of appeals correctly concluded that "there was no doubt that the defendants 'had an understanding' about bidding" (Pet. App. A13).

2. The court of appeals also correctly sustained the district court's finding that "[f]rom evidence produced at trial * * * the charged conspiracy had a substantial effect on interstate commerce" (Pet. App. 14).

A conspiracy sufficiently "affects" interstate commerce under the Sherman Act if a substantial volume of commerce is involved and the illegal activities have an impact on such commerce. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 784-785; *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 744-746; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219; *United States* v. *Women's Sportswear Manufacturers Association*, 336 U.S. 460, 464; *Northern Securities Co.* v. *United States*, 193 U.S. 197, 332.

---

[5]The resulting bidding pattern of mutual forbearance contrasted sharply with the bidding experience in similar districts over the same time period (Govt. Exs. 1, 2). In our view such evidence corroborates the findings based on the meetings that petitioners had reached an understanding to limit their bids.

Under this standard, the evidence established the requisite effect on interstate commerce. The uncut timber involved was valued at more than $20 million and the end-products at approximately $85 million (Govt. Exs. 368-372). Petitioners stipulated that most of the end products produced from such timber "moved in interstate commerce" (R. 691).[6] No further proof was necessary.

Champion International contends that the indictment did not allege the affecting-commerce theory (Champion Pet. 3, 13). But those precise words need not be used in an indictment, provided the defendant is sufficiently informed of the offenses with which it is charged to be able to prepare its defenses. *Hamling* v. *United States*, 418 U.S. 87, 117. The indictment in this case set forth in detail the manner in which the logged timber is sold as logs or processed into wood products shipped to purchasers outside the State of Oregon (Young Pet. App. A4-A5). Champion thus was not misinformed.

---

[6]Even if the district court viewed the indictment as charging restraints in, rather than merely affecting, interstate commerce, the convictions were proper. The "flow of interstate commerce [is] the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 195. Petitioners' purchases of most of the District's timber and their stipulation concerning interstate shipments prove a recurring course of commerce among the states which satisfies the jurisdictional requirement. *Swift and Co.* v. *United States*, 196 U.S. 375, 398-399.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN H. SHENEFIELD,
Assistant Attorney General.

BARRY GROSSMAN,
PETER L. DE LA CRUZ,
Attorneys.

OCTOBER 1977.

DOJ-1977-10

see

77

281

282